El-Tech Research Corporation *and* Pattie Louise Allen *and* Mildred C. McKinney *and* Judy Fletcher. Cases 11–CA–13007, 11–CA–13228, and 11–CA–13261

October 16, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND DEVANEY

On April 11, 1990, Administrative Law Judge Elbert D. Gadsden issued the attached decision. The Respondent filed exceptions. The General Counsel filed cross-exceptions, a motion to strike, an answering brief, and a brief in support of cross-exceptions. The Respondent filed an answering brief to the General Counsel's motion to strike.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings[1] as modified, conclusions[2] as explained in part below, remedy as modified,[3] and to adopt the recommended Order as modified.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We also find without merit the Respondent's allegations of bias and prejudice on the part of the judge. There is no basis for finding that bias and partiality existed merely because the judge resolved all important factual conflicts in favor of the General Counsel's witnesses. As the Supreme Court stated in *NLRB v. Pittsburgh Steamship Co.*, 337 U.S. 656, 659 (1949), ''[T]otal rejection of an opposed view cannot of itself impugn the integrity or competence of a trier of fact.''

Neither is there any bias because the judge and the General Counsel are of the same race. Such an allegation, without more, is insulting and patently unacceptable in any context.

We deny the General Counsel's motion to strike the Respondent's first exception.

In sec. III,B of his decision, the judge refers to Ike Gillespie as an El-Tech manager when Gillespie observed Judith Fletcher talking to two union organizers. In fact, Gillespie was a former El-Tech manager at the time. This error does not affect our decision, as we do not rely on this incident to infer employer knowledge of Fletcher's union activities.

In sec. III,A of his decision, the judge inadvertently calls Erlene Earls a ''trainee.'' In fact, she was a ''trainer.'' In sec. III,G of his decision, the judge inadvertently refers to the layoff of Judith Fletcher. In fact, Fletcher was not laid off, but discharged. In sec. III,G of his decision, the judge inadvertently states that McKinney and Fletcher were laid off. In fact, it was McKinney and Allen who were laid off. These errors do not affect the outcome of this case.

[2] The judge made findings concerning an unlawful interrogation of employee Mildred McKinney by Supervisor Myrtle Hambrick in March 1988, which he inadvertently failed to address in his Conclusions of Law and recommended Order. We shall therefore modify the Conclusions of Law and recommended Order. We shall also modify the Conclusions of Law to reflect our finding below that the Respondent's discharge of Fletcher and layoff of Allen and McKinney violated Sec. 8(a)(3).

[3] Interest on the backpay awards shall be computed in the manner prescribed by *New Horizons For the Retarded*, 283 NLRB 1173 (1987).

1. The judge found that Myrtle Hambrick was a supervisor within the meaning of Section 2(11) of the Act. For the following reasons only, we adopt the finding that Hambrick was a supervisor.

Hambrick evaluated at least one employee in June 1987. Hambrick admitted that she did performance evaluations of at least six employees who worked on her line in 1988 and that she evaluated employees until Bob Roseberry became her supervisor, which was some time in September 1988. Former Personnel Director Erlene Earls testified that performance evaluations were linked to pay raises. Thus, the record establishes that Hambrick gave employees performance evaluations for over a year, from June 1987 to September 1988, and that evaluations affected employees' wages. We conclude that Myrtle Hambrick effectively recommended pay raises for the employees working under her from June 1987 to September 1988. We have previously held that authority to do evaluations that constitute effective recommendations for wage increases is one indicium of supervisory status.[4] We therefore adopt the judge's finding that Hambrick was a supervisor within the meaning of Section 2(11) of the Act during all times material.

2. The judge found that the Respondent unlawfully laid off Mildred McKinney and Pattie Allen. The Respondent contends that Allen and McKinney were laid off as part of a reduction in force due to poor business conditions and not because of their union activities. For the following reasons, we agree with the judge's finding that the layoffs were unlawful.

Pattie Allen worked on and off for the Respondent from October 26, 1987, to October 7, 1988, as an assembler. In early January or February 1988, Allen asked management why she had been transferred to another department. Manager Cecil Farley told her that he thought she wanted to ''stir up trouble.'' Allen replied that she ''could stir up trouble if she wanted to,'' because she had already been in contact with a union organizer.

In July 1988, Plant Manager Mike Shelton announced, at a production meeting for all employees, that he would shut down the plant or move it to a new location if employees tried to bring in a union. In August 1988, Allen asked Plant Manager Jerry Adams why she had not been promoted to a supervisory position for which she had been recommended. Adams' response was that Allen was absent too much,[5] but that ''mainly, you're a union organizer.'' The following month Plant Manager Shelton told Allen that she was a ''known troublemaker'' and was hated by another manager and by other employees because of her attempts to organize a union. On October 6, 1988, Allen

We shall modify the remedy and recommended Order to make clear that the Respondent must, if it has not already done so, offer the discriminatees reinstatement.

[4] See *Iron Mountain Forge Corp.*, 278 NLRB 255 (1986).

[5] Pattie Allen's absenteeism was high due to medical problems, but most of her absences were preapproved as medical leave.

came to Adams with a list of complaints on behalf of herself and other employees and then requested a raise.

Mildred McKinney worked for the Respondent as an inspector from April 26, 1987, until October 7, 1988. In January or February 1988 Judith Fletcher came into the inspection department and asked McKinney if she thought a union would be good for employees. McKinney told Fletcher she did not see how it could hurt because so many employees were having trouble getting raises. She gave Fletcher a list of employees' names and clock numbers.

In July or August 1988, McKinney and other employees were talking at work about unionizing. Myrtle Hambrick overheard them and said that she had been told by management to report anyone heard talking about the Union and that they would be fired. McKinney then told Hambrick that she felt a union was needed at the plant.

On October 4, 1988, Hambrick approached McKinney and asked her if she had heard of any employees trying to start a union. McKinney answered no, but that ''I would be the first damn one to sign for it.'' When Hambrick replied that she better watch what she said because she could get fired for talking about the Union, McKinney said she had just been kidding.

On October 7, 1988, the Respondent laid off 27 employees. Earlier in the day, Adams had announced that there was going to be a layoff, that it would not be done by seniority, and that they wanted to get rid of the ''troublemakers and gossipers.'' The Respondent's past practice had been to rely on seniority in determining which employees should be laid off. Witnesses for the Respondent testified that the criteria on which the October 7 layoff decisions were based were employees' attitude, attendance, and performance.

In *Wright Line*,[6] the Board set forth its test of causation for cases alleging violations of Section 8(a)(3) and (1) of the Act. First, the General Counsel must make a prima facie showing sufficient to support the inference that protected conduct was a motivating factor in an employer's decision. Once this is established, the burden shifts to the employer to demonstrate that the same action would have been taken even in the absence of protected conduct.

We agree with the judge's findings that the Respondent had knowledge of Allen's and McKinney's union activities, and that neither of them had ever been disciplined for problems with performance, attendance, or attitude. In fact, Allen had been recommended for a supervisory position just 3 months earlier, based on her performance ratings. Thus, even accepting the Respondent's assertion that it had legitimate economic reasons for the October 7 layoffs, it failed to show that either Allen or McKinney were selected based on the purported criteria. We also agree with the judge's finding that the Respondent's hiring of two inexperienced employees rather than Allen and McKinney only 5 days after the layoffs belies the claim that the Respondent laid off Allen and McKinney based on nondiscriminatory reasons.

Further, we find it significant that the Respondent departed from an established practice of laying off employees in accordance with seniority. When announcing the October 7 layoff, Plant Manager Jerry Adams stated that the Respondent would not follow seniority. The Respondent offered no explanation for departing from its past practice of laying off the less senior employees first. Further, immediately after announcing the layoff, Adams said that management wanted to ''get rid of all the troublemakers and gossipers.'' Finally, the record establishes that if the Respondent had relied on seniority, McKinney and Allen would not have been laid off.[7] We find that the change in layoff procedure during a period of organizing activity is best explained by Adams' contemporaneous remark that the Company wanted to ''get rid of troublemakers and gossipers,'' i.e., Allen and McKinney, because of their organizing efforts.

We conclude that the Respondent has not shown that it would have laid off Pattie Allen and Mildred McKinney in the absence of their union activity. Therefore, the Respondent violated Section 8(a)(3) and (1) of the Act when it laid them off on October 7, 1988.

AMENDED CONCLUSIONS OF LAW

1. Substitute the following for Conclusion of Law 9.

''9. By discriminatorily discharging employees and laying off other employees because of their union activities, the Respondent has violated Section 8(a)(3) and (1) of the Act.''

2. Insert the following as Conclusion of Law 10 and renumber the subsequent paragraph.

''10. By interrogating employees about their union activities, the Respondent has violated Section 8(a)(1) of the Act.''

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, El-Tech Research Corporation, Princeton, West Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 1(a) and reletter the subsequent paragraphs.

[6] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[7] Sec. III,G of the judge's decision contains a list, extracted from R. Exh. 9, naming 22 employees who were hired at later dates than either Allen or McKinney. Only one of those on the list was laid off on October 7.

''(a) Interrogating employees about their union activities.''

2. Substitute the following for paragraph 2(a).

''(a) If the Respondent has not already offered reinstatement, offer Judy Fletcher, Pattie Allen, and Mildred McKinney immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed, and make them whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.''

3. Insert the following as paragraph 2(b) and reletter the subsequent paragraphs.

''(b) Remove from its files any reference to the unlawful discharge and layoffs and notify the employees in writing that this has been done and that the discharge and layoffs will not be used against them in any way.''

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees the following rights:

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choosing

To act together for mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT interrogate you about your union activities.

WE WILL NOT create the impression among you that your union activities are under surveillance by us.

WE WILL NOT refer to employees interested in or engaged in union activity as ''union organizers,'' ''troublemakers,'' ''rumor starters,'' ''gossipers,'' or ''hellraisers.''

WE WILL NOT threaten you with closing or moving our plant because you engage in union activity.

WE WILL NOT inform you that you are not considered for supervisory positions because of your union activities.

WE WILL NOT threaten you with discharge because you engage in union activities.

WE WILL NOT inform you that you are hated by other employees because of your union activities.

WE WILL NOT discharge, layoff, or otherwise discriminate against any employees for organizing or supporting the United Mine Workers of America, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the right guaranteed you by Section 7 of the Act.

WE WILL, if we have not already done so, offer Judy Fletcher, Pattie Allen, and Mildred McKinney immediate and full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed and WE WILL make them whole for any loss of earnings and other benefits resulting from their discharge and layoffs, less any net interim earnings, plus interest.

WE WILL notify Judy Fletcher, Pattie Allen, and Mildred McKinney that we have removed from our files any reference to their discharge and layoffs and that the discharge and layoffs will not be used against them in any way.

EL-TECH RESEARCH CORPORATION

Paris Favors Jr., Esq., for the General Counsel.

Lawrence E. Morhous, Esq. (Hudgins, Coulling, Brewster, Morhous & Cameron), of Bluefield, West Virginia, for the Respondent.

DECISION

STATEMENT OF THE CASE

ELBERT D. GADSDEN, Administrative Law Judge. An unfair labor practice charge was filed on October 18, 1988, and an amended charged on November 17, 1988, by Pattie L. Allen. Unfair labor practices charges were filed on March 13, 1989, by Mildred McKinney, and additional charges filed on April 3, 1989, by Judy Fletcher against the Respondent. A complaint, first consolidated complaint, and second consolidated complaint and notice of hearing were filed on behalf of the General Counsel by the Regional Director for Region 11, respectively, on December 2, 1988, April 25, and May 13, 1989.

In essence, the second consolidated complaint alleged that since on or about April 18, 1988, Respondent through its supervisors or agents have restrained, coerced, and interfered with the union activity of its employees by:

(1) Creating the impression among its employees that their union activities were under surveillance.

(2) Referring to employees engaged in union discussion or activities as ''trouble makers, rumor starters, and gossipers.''

(3) Threatening employees with plant closure and plant movement to another state because of employees' union interests and activities.

(4) Informing one employee she was awarded a supervisory position because of her union activities.

(5) Threatening employees with discharge because of their union activities.

(6) Informing employees they were hated by other employees because of their union activities.

The second consolidated complaint also alleges that Respondent further coerced, restrained, and discriminated against employees by discharging an employee, and laying off two other employees, and thereafter refused to recall either because of their union activities.

The Respondent filed an answer to the complaint on December 19, 1988, an amended answer to the first consolidated complaint on April 25, 1989, and an amended answer to the second consolidated complaint on May 13, 1989, denying that it had engaged in any unfair labor practices as set forth in the complaints and the consolidated complaints.

A hearing in the above matter was held before me in Princeton, West Virginia, on October 17, 18, and 19, 1989. Briefs have been received from counsel for the General Counsel and counsel for the Respondent, respectively, which have been carefully considered.

On the entire record in this case, including my observation of the demeanor of the witnesses, and my consideration of briefs filed by respective counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is now, and has been at all times material, a West Virginia corporation with a plant located at Princeton, West Virginia, where it is engaged in the manufacture of electrical computer components.

During the past 12 months, a representative period, Respondent received at its Princeton facility good and raw materials valued in excess of $50,000 directly from locations outside the State of West Virginia; and during the same period, it shipped from its plant products valued in excess of $50,000 directly to locations outside the State of West Virginia.

The complaint alleges, the answer admits, and I find that Respondent is, and has been at all times material, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that the United Mine Workers of America (the Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Background Information*

Respondent owns and operates a plant in Princeton, West Virginia, where it is engaged in the manufacture of electrical and computer component.

The parties stipulated that El-Tech Research Corporation (El-Tech) changed its name to Electronic Systems Management Corporation (ESMC) on August 4, 1989.

At all times material, the following named persons occupied the positions set opposite their names, and are supervisors within the meaning of Section 2(11) of the Act:

Mike Shelton—General manager and vice president of marketing until September 15, 1988.

Gerry Adams—Became plant manager on September 16, 1988, but no longer services in that capacity.

Erlene Earls—Personnel director until September 16, 1988, thereafter she became a trainee until October 7, 1988.

John Danes—Formerly plant manager of El-Tech, became chief operating engineer of ESMC on October 1, 1989.

B. *Union Activity of the Employees*

Pattie L. Allen worked off and on for Respondent from October 26, 1987, to October 6, 1988. She returned to work March 26, 1989, and remained there until August 14, 1989.

On October 6, 1988, Allen was an assembler under group leader Rovena Lee, who reported to Ralph Leach. Allen worked on only commercial jobs and was not certified to perform military work.

In early January or February 1988, Allen and Regina Oxley were transferred and Allen proceeded to inquire of Personnel Director Erlene Earls why she was transferred. She made her inquiry in the presence of Manager Cecil Farley, while Plant Manager Shelton was standing between the doorway. Farley replied that he would check into it but he thought she wanted to stir up trouble. Allen told Farley if she wanted to stir up trouble she could do so because she had contacted Danny Surface to organize a union. She said she had heard talk about a union at the time but the employees were afraid to do anything about it.

Allen said she knew Judith Fletcher was involved in union activities in June 1988 because Fletcher had told her she had been contacted by other employees' to organize a union; that they had a prior meeting and she asked Allen if she was interested in helping them get one. Allen told Fletcher, sure, if she would not lose her job. Thereafter, Allen testified that she called the Union on October 6, 1988, and the union meeting was scheduled for October 13. She contacted three other employees at home by telephone, Darlene Pennington, Ada Smith, and Barbara McKinney, the day before, and asked if they would sign a card and attend the union meeting. They said ''yes.''

The next day she picked up Debbie Mason on the way to work and asked her if she would be willing to sign a card to get a union. She said yes, and that she would attend the meeting October 13. Allen said she also talked to Pennington and Smith about the Union on the parking lot and at the lunch table at work. She said she attended the July 1988 production meeting where Manager Shelton told the employees if they brought in the Union he would shut the damn plant—door—down and move the plant to Baltimore, less than 30 minutes from his home. She said that during a telephone conversation with Shelton on September 12, 1988, he accused her of starting a union.

Allen testified that she met with Plant Manager Adams on October 6, 1988, and read 10 of her dissatisfactions to him including her involuntary transfer from assembler position to nonclassified work. Adams was writing down her complaints and told her he needed more specific data and he would get back to her the next day. However, the next day, October 7, 1988, Allen was terminated. She said she went home and called the Union (Danny Surface).

On cross-examination Allen also testified that she tried not to discuss the Union in the presence of management, and that

neither she nor any of the other employees wore a union insignia or other object identifying the Union.

Judith (Judy) Fletcher was employed by El-Tech February 12, 1987, to October 3, 1988, and again, from April 4, 1989, as a quality control inspector. She worked under the supervision of Dan Parker who reported first to Mike Shelton and later to Gerry Adams. Fletcher worked under group leader Helen Abshire. Although Fletcher was certified to perform military work she sometimes performed commercial work.

Fletcher testified that she commenced discussing unionization with fellow employees in November 1987, before the Respondent gave employees merit raises. When the plant was Rockwell, before it became El-Tech, she said it was unionized and several employees from there worked with them at El-Tech. She and other employees would ask the former Rockwell employees how was the Union, was it fair, and should they try to organize one at El-Tech. She carried on her discussions of the Union with the assistance of Lena Hearld and Darlene Pennington with 25 workers.

Assembler Martha Neeley testified that sometime in December 1987 while she, Mildred McKinney, Myrtle Hambrick, and others were in the breakroom someone said a union drive was starting. McKinney said, ''Well I'll be the first to jump on the ban wagon,'' and Hambrick said, ''If you do, they will show you the door.''

Fletcher said she was evaluated in August 1987, and in January 1988, Respondent gave merit raises to some employees, but not to herself and others on the line. She and others on the line questioned line group leader Hambrick, Military Supervisor Bob Roseberry, Supervisor Erlene Earls, Production Manager Cecil Farley, and Manager Mike Shelton about not receiving a raise. When she went home, Fletcher said she discussed the raise matter with her husband, who suggested she contact the wage-and-hour representative of the Department of Labor. She called the latter and thereafter called William Farley of the IUE Union in January 1988. Near the end of January 1988, she, Lena Hearld, and Darlene Pennington met with Farley at the Park Inn, in Princeton, West Virginia. Thereafter, they met with him on four or five occasions at the Park Inn.

Mildred McKinney testified that in January or February 1988 Judy Fletcher came into the inspection department and asked her if she thought a union would be good for the employees. She told Fletcher she did not see how it could hurt ''because so many of us were having trouble'' not getting raises. Fletcher asked for names of employees and McKinney said she gave her a list of names and clock numbers.

On one occasion in January 1988 when Fletcher and her husband met William Farley and two of his union representatives at the Park Inn, Gillespie, a general manager of El-Tech, came into the bar. As he passed her table she and Gillespie mutually recognized each other. He joined two gentlemen at a table 10 or 15 feet from her table. Occasionally, Fletcher said she and Gillespie looked at each other. Both of Farley's union representatives at her table had their windbreakers with the IUE symbol on the back of them hanging on the back of their chairs, facing Gillespie. As Gillespie departed the Inn she noted that he looked at her party table.

Fletcher also testified that she, Darlene, and Lena would tell Supervisor Roseberry and Cecil Farley that things would improve if they organized a union. She said they continued their union efforts until March 1988 when there was a layoff, and they discontinued their organizing activity because they did not want to lose their jobs.

Darlene Pennington testified that before the July 1988 production meeting she had heard employees discussing the Union. Rovena Lee testified that before the October 1988 layoff she had heard Pattie Allen, Mildred McKinney, and Judy Fletcher discussing the Union; and that she was interested in the Union, and while on the job, would discuss with them the benefits of a union and how to organize one. Jeanette Brooks also testified that before October 1988 she too heard employees discussing the Union in the plant. However, she said to her knowledge, no one had informed management about it.

Judy Fletcher further testified that while near the work station of Myrtle Hambrick in August or July 1988 she and other employees were talking about the Union. Hambrick came to them and told them that she had been informed that she was to report to the front office any one who was caught talking about the Union, and that such employee or employees would be fired immediately. Fletcher said as loud as the conversation was Mildred McKinney, Tammy Francis, and practically everyone on the line could hear it. She looked at Hambrick and said, ''it sure couldn't hurt,'' and McKinney said she felt that a union was needed.

Donna Reed, who had worked on the line for Myrtle Hambrick, testified that sometime around August or September 1988 when she started working on the line in weapons spec, she, Judy Fletcher, and others discussed unionization. Judy Fletcher said something about a union and Hambrick, who was standing nearby, said ''I'll tell you right now, . . . if anybody hear you say anything about the union, you will be fired.'' Fletcher said, ''Well we need a union around here. That way all these men wouldn't be walking around here with their hands in their pockets.'' Hambrick said, ''Well it came from the front and they told us if we heard anybody talking about the union, we are to come up there and tell them and that you would be fired.''

Conclusions

Without deciding at this juncture whether Myrtle Hambrick is a supervisor within the meaning of the Act, it is clear from the undisputed testimony of Pattie Allen, Judy Fletcher, Mildred McKinney, and Martha Neeley that union activity of the employees commenced in Respondent's plant about November 1987 and continued until the layoffs in March 1988. It is also clear from the corroborated and uncontroverted testimony of Pattie Allen, Judy Fletcher, Mildred McKinney, Darlene Pennington, Donna Reed, Rovena Lee, and Jeanette Brooks that union activities of the employees resumed in Respondent's plant in July and August 1988, and was still in progress at the time the layoff occurred in early October 1988. I was persuaded by the demeanor of the above-named witnesses that they were testifying truthfully, and their undisputed testimony in this regard, is consistent with the credited evidence of record.

Consequently, I find on the above-credited testimony and other uncontroverted and credited evidence of record, infra, that union activity of the employees was in progress in Respondent's plant from November 1987— March 1988, and again during July—October 1988; that Pattie Allen, Judy Fletcher, and Mildred McKinney spearheaded the latter union organizational activity; and that Respondent had knowledge

of their union interests and activities as further shown under section C, infra.

C. *The Supervisory Status of Myrtle Hambrick*

The second consolidated complaint alleged that Myrtle Hambrick was at all times material a supervisor within the meaning of the Act. Respondent has denied that Hambrick is or was a supervisor within the meaning of the Act, and contends that Hambrick was and is a group leader—lead person.

The complaint also alleges that in her supervisory capacity Hambrick committed certain 8(a)(1) conduct for which the Respondent is legally responsible. Since the alleged supervisory status of Hambrick is in dispute, the evidence of her status will be evaluated before considering the legality of her alleged unlawful conduct.

The Charging Parties and counsel for the General Counsel contend that although group leader Myrtle Hambrick and the Respondent maintain that Hambrick and other group leaders were not supervisors the evidence will show that they were in fact supervisors within the meaning of the Act.

Section 2(11) of the Act defines a supervisor as one who has ''authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or has responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.'' *Iron Mountain Forge Corp*., 278 NLRB 255, 257 (1986).

In evaluating the evidence of supervisory status of an employee, the Board has held that it is the function, duties, and authority of the individual, rather than his or her title, which are significant in determining supervisory status. *Marukyo U.S.A.*, 268 NLRB 1102 (1984), citing *Golden West Broadcasters-KTLA*, 215 NLRB 760, 761 (1974).

Evidence

Cecil Farley was manufacturing manager and second shift manager for operations for the Respondent during 1988. He testified that lead persons did not have supervisory authority and their duties were limited to ensuring that employees had tools and necessary materials. Sometimes they worked on the line with employees and they had no authority to hire, fire, or establish working conditions for employees.

Respondent's personnel director, Terry Ann Philpott, testified that lead persons are hourly paid and have timecards and supervisors do not. She said she had a timecard for Pattie Allen for June, July, August, and September 1988.

Jeanette Brooks testified that her job title was group leader and she was required to see that employees were doing their jobs. She said she and Myrtle Hambrick did the employees' timecards; and that without having to check with supervisors, she gave her employees permission to take sick leave, and did not require them to present a doctor's excuse unless they were absent 3 days or more. However, on orders from Supervisor Jim Camp, she did require a doctor's excuse from Pattie Allen for being out sick 1 day (3–89). She said she had never given employees permission to leave early unless they were ill. If an employee was late, she said she would ask them why, and if she did not think the employee's explanation was reasonable she reported it to her supervisor, who took it from there.

Periodically, she evaluated employees' performance, conduct, and safety habits.

Brooks had as many as 42 employees working under her at one time. She would find out what her employees' needed to do by talking directly to Respondent's customers (Solarex) on a day-to-day basis. She said Hambrick did not do this, it all depended on your supervisor. She also trained employees.

Myrtle Hambrick testified that her job title was group leader and that in October 1988 her supervisor was Bob Roseberry; and that he sat up production schedules, gave them to her, and that she saw to it that employees on her line got the work done. She helped them on the line whenever she was not busy otherwise.

Hambrick further testified that she also checked line employees' timecards to see that they were accurate for job numbers and time, and she turned them in to Supervisor Roseberry, who signed them unless he was absent. If he was absent, she signed them.

Hambrick acknowledged that:

> (1) She is hourly paid.
>
> (2) She did the performance evaluation on Mildred McKinney before she had a supervisor on the floor and because she said she was asked to do so by Kellog and Weikle (supervisors). She also acknowledged that she did the performance evaluation on six other employees at the same time.
>
> (3) She has to fill out an accident report if employees are hurt on the job.
>
> (4) She was in the training class with her supervisors and office personnel on one occasion, but she could not recall the approximate date.
>
> (5) Her supervisor allowed her to permit employees with a doctor's or dental appointment to leave the job, so long as she informed him.
>
> (6) She testified that she was given the password to the MAPICS-II System for input, but not for output, and she was the only lead person with it. More specifically, counsel for the General Counsel's Exhibit 30 describes Hambrick's password authority as follows:
>
> (7) In further support of his contention that Hambrick exercised indicia of supervisory authority, counsel for the General Counsel's Exhibit 30 from the personnel file of Hambrick was submitted and reads as follows:
>
> *USER AND PASSWORD ACKNOWLEDGEMENT STATEMENT*
>
> TO: *MYRTLE HAMBRICK*
>
> You are hereby provided with the following USER ID and PASSWORD to access MAPICS-II software through IBM System/36 Terminal. It must be realized that this USER ID and the PASSWORD are exclusively provided to you to access the particular module of MAPICS-II. You will only have the access to the modules which are authorized to you through specific MAPICS-II Security System.
>
> Individual USER ID and PASSWORD are very confidential information and these, under no circumstances,

could be displayed, exchanged, or shared with other employees. It is a company security policy and it must be obeyed by all personnel. If you feel that your USER ID and/or PASSWORD are disclosed to others, please inform Mike Shelton immediately.

Your cooperation in this matter will be highly appreciated.

* Your USER ID = *Myrtle Hambrick*

Conclusions

It may be reasonably inferred from Hambrick's having been given the password to the MAPICS-II System that she also had authority to prepare production or progress reports and documentation procedures as outlined in the General Counsel's Exhibit 29, with privileged access to put such data into the MAPICS System. If she did not prepare, collect, or submit such data for reports on a regular or alternate basis, she would not have had a need for access to MAPICS.

Also from Hambrick's personnel file is General Counsel's Exhibit 29 describing specific functions giving her an opportunity to master on a percentage scale:

For: Benchmarks 2 & 3

COMPANY: EL Tech Research

PARTICIPANT *Hambrick, Margarette*
TRAINING AREA ASSEMBLER III

Task	*Date Mastered*
1. Make decisions regarding work assignments and schedules	_____
2. Qualify for WS6536E	_____
3. Coordinate with Production Control	_____
4. Blueprint specifications	_____
5. Performance evaluations	_____
6. Personnel relations and procedures	_____
7. Progress reports and documation procedures	_____ [1]

Conclusions

Although the above form (G.C. Exh. 29) does not indicate when or what percentage of the enumerated functions Hambrick has mastered, it is clear that she was authorized, and has in fact exercised the additional decision-making authority of assigning work to line employees, evaluating the work performance of Mildred McKinney and six other employees, and has performed personnel relations and procedures functions by having authority to fill out accident reports.

[1] I credit the essentially uncontroverted testimony of Helen Abshire, Rovena Lee, Jeanette Brooks and Myrtle Hambrick, although I do not accept any denial by them of supervisory authority because those terms are technical and constitute a legal conclusion. I was persuaded by the demeanor of each of these witnesses that their testimony otherwise was essentially truthful.

33% of the job related tasks for this participant have been mastered

_____ _____
Instructor's Signature Participant's Signature

_____ _____
Date Date

In determining the supervisory status of Myrtle Hambrick, it is first observed that the evidence of whether or not Respondent's lead persons had, or actually exercised supervisory authority is not consistent. While the evidence is consistent that employees with the title ''group leader'' or ''lead person'' do not have the authority to hire, fire, suspend, transfer, lay off, recall, or promote employees, the evidence is otherwise inconsistent with respect to the authority of group leaders to assign work, direct execution of some work, and exercise other indicia of supervisory authority.

In this regard, it is noted that Group Leader Helen Abshire only coordinated work assignments of the employees that was submitted to her by line supervisors. Hence, with the essential absence of more probative indicia of supervisory authority, I find that Helen Abshire was a group leader and not a supervisor within the meaning of the Act.

Group Leader Rovena Lee assigned work to employees after she was told what needed to be done by supervisors. However, she could recommend the discharge of an employee and collaborate with, or join supervisors in the disciplinary decision and actions taken. Moreover, Lee effectively recommended a pay raise for employee Pattie Allen who worked under her direction, and Allen did in fact receive the pay raise. Since the exercise of such indicia of supervisory authority by Lee was in the interest of the Respondent, was not of a merely routine nature, and required the exercise of independent judgment on her part, I find Lee is a supervisor within the meaning of the Act.

Demonstrating even greater exercise of indicia of supervisory authority is Group Leader Jeanette Brooks. In addition to seeing that employees are doing their jobs, Brooks did their timecards, unilaterally gave them permission to take sick leave, did not require them to present a doctor's excuse unless they were absent 3 days or more, and periodically evaluated their work performance.

If employees were late, Brooks would ask them for an explanation, and if she did not deem their explanation sufficiently reasonable, she reported the fact that they were late to her supervisor. Significantly, Brooks has had as many as 40 employees working under her direction at one time. No other group leader was shown to have had as many employees work to oversee, as did Brooks.

I am therefore persuaded by the evidence that such responsible authority entrusted to and exercised by Brooks was in the interest of the Respondent, was not of a merely routine or clerical nature, but involved the exercise of independent judgment by her. Consequently, I find Jeanette Brooks exercised sufficient indicia of supervisory authority that she is in fact a supervisor for the Respondent within the meaning of the Act.

Another classical demonstration of indicia of supervisory authority is the collection of authoritative responsibilities carried out by Myrtle Hambrick. Although Hambrick's job title is group leader, the foregoing essentially uncontroverted and credited evidence shows that Hambrick, who is hourly paid:

a. Saw to it that employees on her line got the work out and she helped them on the line when she was not busy otherwise.

b. Checks the employees' timecards for accuracy of job numbers and turned them in to her supervisor.

c. Signs the timecards when her supervisor, Roseberry, is absent.

d. Did performance evaluation on Mildred McKinney and six other employees.

e. Fills out an accident report whenever an employee is injured on the job.

f. Is the only group leader entrusted by the Respondent with the confidential password for privileged access to the MAPICS-II IBM System for input of information.

g. Attended a training class with supervisors and office personnel.

h. With the knowledge of her supervisor, allows employees with a doctor's or dental appointment to leave the job and thereafter inform her supervisor of such fact.

Consequently, considering the above described duties performed by Hambrick, it is clear that the authority and the execution of all such functions were on behalf of, or in the interest of Respondent Employer. Such functions are not of a routine or clerical nature, and several of them require the exercise of independent judgment. Additionally, Hambrick was the only employee with the job title of group leader who had access to the MAPICS System. Thus, it is clear from the foregoing evidence of Hambrick's attending training class with supervisors, as well as other evidence in the record, infra, that Hambrick is more closely aligned with management than she is with fellow employees. I therefore conclude and find upon the foregoing evidence of record and the aforestated reasons that Myrtle Hambrick is a supervisor within the meaning of the Act.

D. *Creating the Impression of Surveillance*

According to the corroborated and credited testimony of Donna Reed, not long before Judy Fletcher was laid off in October 1988, she heard Fletcher say something about a union. Group leader on the line, Myrtle Hambrick, who was standing nearby, said, ''I'll tell you right now . . . if anybody hears you say anything about the Union, you will be fired.'' Fletcher said, ''Well, we need a union around here. That way all these men wouldn't be walking around with their hands in their pockets.'' Hambrick said, ''Well it came from the front and they told us if we hear anybody talking about the union, we are to go up front and tell them and the employee would be fired.'' Judy Fletcher corroborated the above testimonial account of Donna Reed as having taken place between July and August 1988. I do not consider this difference in the estimated time of the occurrence as having an adverse affect upon the credibility of either witness. The differences are reasonable differences in estimating time. Fletcher further testified that as loud as the conversation was it could be heard by Mildred McKinney, Tammy Francis, and practically every other employee on the line. Fletcher said she looked at Hambrick and said, ''A union sure couldn't hurt.''

Mildred McKinney testified that 3 days before she was laid off on October 7, 1988, Myrtle Hambrick asked her had she heard anything about a commercial employee trying to organize a union. She told Hambrick she had not heard about such an effort, but that she would be the first damn one to sign for it because she was mad about another male employee receiving a raise. Hambrick said, ''I better watch what I said, because I could get fired. McKinney said she told Hambrick she was just joking.'' She said she knew Hambrick was going to tell management.[2]

Conclusion

Since Myrtle Hambrick has been previously found a supervisor within the meaning of the Act, her statement to Reed and McKinney that they were being watched by management, and if they are heard talking about the Union she, Hambrick, and other unnamed persons were instructed to report them to management and they would be fired. Such statement by Supervisor Hambrick clearly created the impression among the employees that their union activities were under surveillance by the Respondent; and also constituted a threat by management to discharge them for engaging in union discussions and other union organizing activities.

I therefore conclude and find upon the foregoing credited evidence that by creating the impression among employees that their union activities were under surveillance, and by threatening to discharge them for engaging in union activities, Respondent has coerced and restrained employees in the exercise of their Section 7 protected rights, in violation of Section 8(a)(1) of the Act.

E. *Organizing Employees Called ''Union Organizers,'' ''Rumor Starters,'' and ''Gossipers,'' and One Such Employee Told She Would Not be a Supervisor Because She was a ''Union Organizer''— ''Hellraiser''*

Erlene Earls, Respondent's personnel director and security officer prior to the October 7, 1988 layoff, testified that in June 1988 Allen's supervisor, Peggy Bailey, told her what a good worker Allen was. Mike Shelton also told her Allen was a good worker and that she would make a good supervisor because people would listen to her. In August 1988, Shelton said he should make Allen a supervisor. Supervisory jobs would be posted and Allen would apply for them but she would not be selected. Earls said Allen came to her and inquired why she was not being considered for any of the positions posted. Earls said she took Allen to Plant Manager Gerry Adams and asked why Allen was not being considered for the positions. Adams asked Earls to get Allen's folder. She gave Adams Allen's folder and he looked at it and said, ''Well, the main thing is, she's absent too much.'' However, he turned around to Allen and said, ''but you are a union organizer.'' As Earls was taking notes, which was her customary duty, Adams told her to put the ''GD'' pencil down,

[2] I credit the testimonial account of Donna Reed and Mildred McKinney. Not only are their accounts undisputed but they are essentially corroborative of each other. Moreover, I was persuaded by the demeanor of Reed and McKinney that they were testifying truthfully in this regard, and their accounts are consistent with all of the credited evidence of record.

he was tired of her note writing. She complied with his command.[3]

Mildred McKinney testified that on the morning of October 7, 1988, Plant Manager Gerry Adams called in all the employees and told them there was going to be a layoff, and it was not going to be according to seniority; and that management was going to get rid of the ''troublemakers and gossipers.''

Pattie Allen testified that while on sick leave she telephoned Mike Shelton on or about September 12, 1988, to inform him when she would be returning to work. During that telephone conversation she asked Shelton about a supervisory position which she did not get. Shelton told Allen she did not get the supervisory position because Cecil Farley hated her. He said, ''Well, you know you're a union organizer and I've been told this before by people in supervision; that many employees at the plant hate you because you are a known and troublemaker.'' When Allen told him she was not Norma Ray and she was not going to organize a union, Shelton said she was a ''hellraiser.'' Shelton nevertheless told Allen to report to work and have personnel change her job title to senior repair person, with a substantial pay increase.

When Allen reported to work on September 14, 1988, she learned that the position was not a supervisory position as she had previously believed.

Conclusions

Although the testimonial accounts of Mildred McKinney and former Personnel Director and Trainer Erlene Earls, regarding management's use of the terms ''troublemakers,'' ''union organizers,'' and ''gossipers'' are not entirely consistent, they nevertheless have a ring of consistency, are corroborative of each other, and are supported by other credited evidence of union animus in this record. In this regard, McKinney's statement that on October 7, 1988, Manager Gerry Adams said management ''was going to get rid of the troublemakers and gossipers'' is essentially supported by Pattie Allen's account that Manager Mike Shelton told her she was a ''union organizer, troublemaker and hell raiser,'' and that many employees in the plant hated her because of her union interest. Allen's account is partially corroborated by Erlene Earls' account, who said she heard Manager Adams tell Allen, ''You are a union organizer.''

Not only are the use of the above descriptive appellations by Respondent's management persuasive probative evidence that they were uttered by management, but I was equally persuaded by the demeanor of McKinney, Allen, and Earls that they were testifying truthfully. Neither Respondent nor General Counsel produced Manager Mike Shelton as a witness in this proceeding, and I was not persuaded by the demeanor of Gerry Adams that any denial of the above statements attributed to Shelton or himself by McKinney were truthful. Consequently, I credit the accounts of McKinney, Allen, and Earls and discredit any denials by Adams.

[3] Although Adams may have denied making the statements attributed to him by Earls, I nevertheless credit Earls' testimonial account and discredit Adams' denial, because I was persuaded not only by the demeanor of Earls, but also by the credited evidence in this record, that she was testifying truthfully, and Adams was not. Moreover, as noted below, Earls' testimonial account corroborates the testimonial account of Allen that while in Earls' office Shelton told Allen, ''You are a union organizer.''

Since Managers Shelton and Adams made such references (union organizers, rumor starters, gossipers, or hellraiser) during mid-September and October 7, 1988, when union activities of the employees were in progress, and of which fact the record has demonstrated Respondent had knowledge, I find such appellations (union organizers, troublemakers, gossipers, rumor starters, and hellraisers) clearly had reference to the employees engaged in concerted or union activities. This being so, such appellations are obvious manifestation of union animus, which had a coercive and restraining effect upon the exercise of the employees' protected Section 7 rights, and were in violation of Section 8(a)(1) of the Act.

Construing the above-quoted language attributed to Shelton about the supervisory position, it appears that Shelton's response to Allen was simply an affirmative confirmation of her stated understanding; namely, that she was (supposed) to get the job, but his response in fact implied she did not get the position. Shelton told Allen her understanding that she was to get the job was correct, and that he had confirmed the same supposition when he talked to her husband. At most, it appears that Shelton implied that Allen was simply being considered for the job. This conclusion appears correct when it is noted below that Manager Gerry Adams, as well as other managers who voted for the selection, had some input in the selection for the position.

The evidence does not show that Shelton told Allen you have the job, or the job is yours.

Moreover, it is noted that Shelton told Allen ''we will talk about it when you [and Lauretta Ball] return'' from Baltimore. When Allen returned, she spoke to Shelton about the position and he told her she did not get the votes from management, although she got his 13th vote. He told her other positions would be coming up.

Additionally, Plant Manager Gerry Adams' reaction to his review of Allen's file, according to Erlene Earls, was ''well the main thing is, she is absent too much,'' and he looked at Allen, who was present, and said, ''but you are a union organizer.''

Since Allen's testimony that Shelton called her a ''union organizer'' is indirectly supported by Earls' account of what Manager Adams said to Allen (''you are a union organizer''), I was persuaded by the demeanor of Allen, Earls, and Adams that Allen and Earls were testifying truthfully and Adams was not. I credit their accounts and discredit Adams' uncorroborated account. Moreover, Allen and Earls' accounts are consistent with the total credited evidence of record that Shelton and Adams (Respondent) referred to Allen as a ''union organizer.''

I therefore conclude upon the foregoing credited testimony and evidence of record, that Respondent (Shelton and Adams) clearly implied to Pattie Allen that she was not considered for the supervisory position for which she applied because she was a union organizer; that such antiunion statement by Respondent has a restraining and coercive affect upon the exercise of employee's protected Section 7 rights, and is in violation of Section 8(a)(1) of the Act.

F. *Respondent Threatened to Close Plant if Employees Engaged in Union Organizing Activities*

In this regard, former director of personnel and security officer for Respondent, Erlene Earls testified that whenever Plant Manager Mike Shelton returned from an out-of-town

trip, he asked her ''how is our little union getting alone . . . that whether you know it or not, we already have one in the back [referring] to a little area in the back of the plant where Pattie Allen and three or four other employees worked.'' Shelton said it goes on all the time. Earls said she told Shelton she did not know anything about it and that the girls needed to talk to him.

Consequently, in July 1988, Shelton called a meeting of the commercial workers in the conference room. During the meeting Earls said she heard Shelton tell the employees, ''You all go ahead and form a union if you want to . . . if you do, we'll close the plant the next day.''

Correspondingly, employee Martha Neeley testified that on or about July 7 or 8, 1988, she attended a meeting of approximately 40 commercial employees, during which Plant Manager Shelton said some of the employees have been talking about the Union and ''he would shut down the plant'' before he would let the union come in.'' Shelton had a tape recorder on the table by his elbow at the time.

Neeley further testified that Shelton also told the employees they were lax in their production and he could go to the pool hall and get drunks who could do a better job then they did. Several employees asked what could the employees do to improve performance. Shelton said, ''quit talking about the union and work more.''

Also in this regard, employee Darlene Pennington testified that Manager Shelton stated during the July 1988 meeting that ''before the union came in there, they would close the doors and move the plant . . . to Maryland, because it was about 30 minutes from where he lives.'' Shelton had a tape recorder on the table.

Rovena Lee also testified that during the July 1988 meeting with the production employees, Manager Shelton told them ''before he would see a union in the plant, he would close it down and move it up to Maryland at his home.'' Lee said Shelton also told the employees he could go to Joe's Bar and Grill and get people to do their work; that trained monkeys could do what they were doing. Shelton had a tape recorder on in the room at the time.

Jeanette Brooks testified that during the July 1988 meeting with the employees Manager Shelton told the employees ''anyone caught talking about the Union or trying to form a union would be immediately terminated and the plant closed and moved to Reston.'' She said Shelton had a tape recorder in front of him.

Brooks further testified that she used to live with Supervisor Jim Camp in the Company's condo off and on from early October 1988, and consistently from January to April 1989. In October, during a meeting of Camp, Virgil Clark, and Shelton, Brooks said she heard them agree that the plant should not be unionized. Shelton repeated his previous statement to the employees, that if the Union came in, the plant would automatically close and would be moved to Reston.

Employee Judy Fletcher testified that during a meeting she heard Manager Shelton tell the employees ''if they got a union, he could shut down the plant and there was a place near Reston where he could move it.''

Conclusions

Manager Mike Shelton did not appear and testify in this proceeding and the corroborating testimonial accounts of Neeley, Pennington, Lee, Brooks, Earls, and Fletcher are essentially uncontroverted in the record. Not only are their testimonial accounts essentially consistent, but I was persuaded by the demeanor of all of the witnesses that they were relatively sure of their respective accounts and truthful in revealing what Shelton had said to them. Their accounts are also consistent with the overall credited evidence of record.

I therefore conclude and find upon the foregoing credited evidence that in July 1988 Respondent (Manager Shelton) threatened employees that Respondent would close the plant and move it to Maryland or Reston if the employees organized a union. Such a threatening ultimatum given by Respondent to the employees had a coercive and restraining effect upon the exercise of the employee's protective Section 7 rights, and is in violation of Section 8(a)(1) of the Act.

G. *Respondent's Alleged Discharge of an Employee and Its Layoff of Two Others Because of Their Union Activities*

The Charging Parties and counsel for the General Counsel contend that Respondent discharged Judy Fletcher and laid off Mildred McKinney and Pattie Allen because of their and other employees' union activities.

Respondent contends Fletcher was terminated for an unexcused absence while on 30 days' probation; and that McKinney and Allen were laid off as a result of a reduction in force due to financial difficulties of the Respondent, and not for their union activities. Respondent further maintains that the layoff of Fletcher, McKinney, and Allen, and other laid-off employees was inevitable, as a result of the low production and financial difficulties of the Respondent's business.

In that regard, Respondent contends the October 1988 layoffs were occasioned by poor business and financial considerations. Martha Neeley testified that since September 1988 Plant Manager Gerry Adams had been telling employees in production meetings that the Company's production was losing contracts and money. Orders were not coming in since May 1988.

Darlene Pennington testified that when Manager Adams first came he told them management would be taking a cut in pay because the Company was having production problems and difficulty in paying its bills. However, she said the employees did not learn there would be a layoff until October 7, 1988.

Donna Reed testified that the employees were periodically told by Manager Adams that if production did not pick up some of them may not be there. She said they did not know from one day to the next if they would have a job. Three weeks later, there was a layoff.

Rovena Lee testified she attended a meeting in September 1988 when Manager Adams arrived on the job, but she does not recall him saying anything about layoffs.

Former managerial employee Erlene Earls testified that Respondent was experiencing financial problems ever since it was in business. She said she was not informed the October layoff was due to financial reasons.

Helen Abshire testified she could see business was bad and Manager Adams kept talking about business being poor and there may be layoffs.

Gerry Adams testified he was hired by Respondent as plant manager from September 1988 until February 1989. When he arrived, he said Respondent was not making a profit, efficiency was down, and there was a morale problem. He

made an assessment of company resources and found that Respondent was overstaffed and was not making its production requirements. Several employees testified that Shelton discussed low production with them in meetings prior to the arrival of Adams.

In September, Adams said he realigned and went from 20,000 to 100,000 billings until Respondent ran into material problems. Based on these findings, a layoff was implemented October 7, 1988, predicated on performance and attendance as evaluated by line supervisors. Consequently, 20 to 38 employees were laid off in October 1988 and supervisors took an across-the-board cut in pay. The entire industry was making adjustments. However, the pay cuts was restored in January 1989 when business had improved.

Jeanette Brook testified that business improved in January 1989 when Respondent received the Solarex contract. Manager Adams denied having any knowledge of the employees' union activities, including any such activities by Pattie Allen.

With respect to the termination of Fletcher and the layoff of McKinney and Allen, the question presented for determination is one of mixed motives for their separation.

In *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the Board held that the causation test in all cases alleging violation of Section 8(a)(3) or Section 8(a)(1) of the Act, turning on employer motivation, the following shall be established:

> (1) The General Counsel shall make a prima facie showing sufficient to support the inference that protective conduct was a ''motivating factor'' in the employer's discharge decision.
>
> (2) Once the above has been established, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protective conduct.

Amid the union organizing activities of the employees and Respondent's knowledge of those activities as established under section B, supra, Respondent discharged Judy Fletcher and laid off Mildred McKinney and Pattie Allen as described below.

The uncontradicted testimony of Judy Fletcher shows that she worked day shift from 8 a.m. to 4:30 p.m., February 12, 1987, until October 3, 1988. During the preceding 13 years, Fletcher had attended Friday afternoon or evening high school football games and had missed only five games. Several weeks before October 1988, Fletcher said she was called to the office of Supervisor Dan Parker. He informed her he was starting a second shift and needed a very reliable inspector like herself to oversee the operations and that the job would pay more because of the shift differential. Fletcher continued to testify as follows:

> A. Well, I told him I would have to discuss it with my husband. And he says, well, can you go call him? I did. I went out and I called him. And when I come back I told him, I said, well, I said, it sounds good but there is just one problem. And he asked what that was. And I told him, I said that for the last several years, over 10 years, I had been going to my high school football games And that I had only missed like 3 games in the last, I believe it was 12 or 13 years, and that I did not want to start missing them now. I actively supported them. I knew the boys that were playing. I was in the Booster Club and that I did not want to miss the football games.
>
> He told me, he said, well, we can work something out for that.

Supervisor Dan Parker did not appear and testify in this proceeding. Consequently, Fletcher's above testimony that Parker told her they could work out something about the second shift conflict with the football game schedule is undenied in the record.

Fletcher further testified that lead person Helen Abshire and Allison Fleeman asked her if she was going to take the second shift. She told them the only way she would take it was if she could work out something for her to continue to attend the football games. She said both Abshire and Fleeman told her if she took the evening shift they would work with her by coming into work in her place on Fridays at game time. Fletcher said she then told Supervisor Parker she would take the second shift, on the condition that she would be allowed to be off on Friday afternoons or evenings to attend football games; that she was willing to go in and work on Saturdays to catch up since the products are not shipped until Mondays; and that Abshire and Fleeman said they would help her with such an arrangement by working in her place. Fletcher said she gave lead person Abshire the game time schedule when Fletcher would need to leave the job.

Abshire did not acknowledge or deny the latter testimony of Fletcher. Instead, she testified that Fletcher told her she had an arrangement with Supervisor Dan Parker to attend the football games on Fridays. She acknowledged she did go into cover for Fletcher one Friday night, because there were no inspectors on the job. According to Fletcher, on August 26, 1988, she left work at 6 p.m. On the same day, Abshire left work at her normal quitting time, 3:30 p.m., went home, had supper, returned to the job, and worked for Fletcher. For the next game, Friday, September 2, Fletcher said she left work at 7 p.m. and Abshire came in for her again and worked for her. The following week Gary Sutliffe was hired as an inspector to help Fletcher.

The next game was out of town on September 9 and Inspector Gene White came in to work for Fletcher, including working with Sutliffe. In preparation for the next game at home on September 16, Fletcher asked Abshire on Thursday whether she needed to get someone to work with Gary Sutliffe on Friday, and Abshire, who had been working with Sutliffe, said he seemed to be doing very well; that he had caught on very well and that she did not think he needed any help. Fletcher agreed with Abshire and she left work at 7 p.m. on Friday, September 9. She reported to work on Saturday, September 10, and asked Peggy White, the commercial supervisor, did Sutliffe have any problems. White said there were no problems and Sutliffe had done very well.

The game on September 23 was out of town and Fletcher testified that she asked Abshire if any body needed to fill in with Sutliffe and Abshire said he had been doing so well there was no need to do so, but she should just make sure he had his paper work. Fletcher got the paper work for the job for Sutliffe and asked him if there was anything that he was going to need. She said half of the work for today had

been done so Fletcher left work at 5:30 p.m. Sutliffe told her to have a good time and wished her good luck.

Fletcher reported to work on Saturday, September 24, an hour late, 4:30 p.m., because she and her husband had an automobile accident on the way in. When she arrived, Abshire was there, and so was Plant Manager Gerry Adams. She told Adams about the accident and he left. Abshire told her there had been a slight problem Friday night. Farley had told Gary Sutliffe to stop working on the job he was working, and work on another job. Consequently, Sutliffe did not have the paper work for the job Farley directed him to perform. Sutliffe called Abshire and she returned to the job, got the paper work for Sutliffe, and went back home.

When Fletcher returned to work on Monday, September 26, she was told to report Dan Parker. When she reported, he told her to sit down, asked her why she had not informed any one she was leaving on Friday. She told him she had informed Abshire, who she always tell. Parker said Abshire told him Fletcher did not inform her she was leaving. Fletcher continued to testify:

> So, I went back to the work area and got Helen and brought her back up. And he asked her, he says, Judy says that she did tell you that she was leaving. And Helen says, well, if she says she did she probably did. Says, I was just so busy I didn't pay a lot of attention.
>
> So, Helen left and he handed me a paper and told me to read it.
>
> Q. What was the paper?
>
> A. The paper was a warning that—where I had been wrote up that I had jeopardized the Company's production schedule or something by leaving and not having somebody there.

Below is General Counsel's Exhibit 6, the warning to Fletcher:

> Friday, Sept. 23, 1988, was a normally scheduled work day. Employee left early leaving new untrained employee by himself to support all of 2nd shift. Employee failed to notify department supervision, nor did employee make any arrangements for coverage by another trained inspector as she did on (2) previous occasions.
>
> Employee severely jeopardized 2nd shift schedules and product acceptance. Employee will be notified that leaving work without notice given to supervisor is a serious offense which may lead to immediate termination.
>
> It is further noted that the inspection GRP.LDR. had to be called back to work to assist in the inspection of material to help meet EER/EL-TECH's weekly commitments.
>
> Disposition:
>
> ____X____First Written Warning
> _____Second Written Warning
> _____Termination
> ____X____Other: *30 day probation period* (9–26 thru 10–26) any unexcused attendance will reflect in termination.
>
> Approved: DE Parker Date: 9/26/88
> Department Manager/Plant Manager

Fletcher further testified that the last sentence on General Counsel's Exhibit 6 was not on the notice when she read it and that she was not asked to sign the notice. She said Sutliffe had been in the job 2-1/2 weeks and in her judgment he was as qualified as she was when she left him on Friday, September 23, except he did not have the key to the document control where drawings were kept. Nonetheless, by Saturday night everything that was to be done on the job was completed and the work was not jeopardized because nothing could have been shipped until Monday. Supervisor Parker did not point out and identify and there were no more products found unacceptable than usual on any other night.

On Wednesday thereafter, Respondent hired a new experienced inspector, Ron McCrosky. Fletcher said she met with Supervisor Parker and Plant Manager Gerry Adams about the written warning (G.C. Exh. 6). It was decided that there would be two inspectors on the night shift. On Thursday, she asked Abshire did she still need someone to fill in for her since both Sutliffe and McCrosky would be there Friday nights. Abshire said she was not sure, she did not see why, but told her to ask Parker. When Fletcher asked Parker did she still need someone to fill in for her, he said, ''yes.'' Thereupon, she asked Inspector Gene White if she would come in and work in her stead Friday night. White said she might, depending on whether her daughter was free. Fletcher then asked Inspector Whelchell would he be able to work for her if White could not. He suggested that she wait and see what White says.

Fletcher said she told Abshire what White and Whelchell told her. Abshire said, ''Well, if they can't, what time are you leaving; that she [Abshire] would come back to work for her. Fletcher told Abshire she would be leaving at 5:30 p.m. and Abshire said ''Well, okay.''

Fletcher said she became ill Thursday night and her husband suggested that she remain home Friday. To avoid a long distance call, she asked her husband to call Parker when he went into work. Her husband told her he called Parker at 1:30 p.m. and she did not go to the football game that evening.

When Fletcher reported to work on Monday, October 3, 1988, she worked an hour, when Parker sent for her. When she reported to his office, he handed her a timecard for the previous week and told her he needed her to sign it. She looked at the card, noted ''sick pay'' was marked for Friday, and she signed it. General Counsel's Exhibits 7(a) and (b) and the record show she is correct in that regard. Supervisor Parker then asked Fletcher did she have a doctor's excuse for Friday and she said, ''no.'' Parker said sit down, ''I have something for you to read'' handing her a termination notice (G.C. Exh. 8), which read as follows:

> Employee was given written warning for leaving work early on 9–26–88 to attend a football game without notification or permission from supervisor. A meeting was held with the employee, plant manager, and supervisor on that date to discuss disciplinary actions. Employee was informed that she would be placed on a 30 day probation period, that any unexcused absence would result in termination. Also, if employee needed to attend football games instead of work then it would be her responsibilities to obtain coverage from another inspector and permission from her supervisor. Asked

employee if she understood the requirements, employee acknowledged understanding. On 9–29–88, Thursday evening Judy asked supervisor if she needed to find coverage on 9–30–88 to attend another football game, the supervisor acknowledged the requirement. On Friday, 9–30–88, employee's husband called supervisor to inform him that Judy was sick and would not be to work. Employee returned to work without doctor's excuse as required. Employee's absenteeism determined to be unexcuse and cause for termination.

____ Reprimand
____ Suspension
____ Discharge

Disposition:

_____First Written Warning
_____Second Written Warning
____X____Termination
_____Other:_____
_____

Approved: DE Parker Date: 10–3–88
Employee's Supervisor

Fletcher said she read the above notice and said ''well.'' Parker asked her if she wanted to talk to Gerry Adams about it, and Fletcher said, ''No, I don't think it would do any good.'' Parker then said,''Well you could talk to Adams about it,'' but she did not. She got her belongings, turned in her tools, and left. She again stated that the notice did not have on it that she was placed on a 30 days' probationary period. Fletcher also testified that no one said anything to her about a dismissal related to her going to football games or her work performance. Prior to September 9, she said she had no warnings or reprimands in her file. She said the employees were always told by supervisor that anytime they were written up, they would receive a first written notice, a second written notice, and the third one would be a termination. She received the first such warning notice September 23, the second on October 3 was a termination. Fletcher's evaluation dated June 25, 1987, by Supervisor Richards indicated that she had very few absences.

On Monday, April 3, 1989, Fletcher said she was called by Virgil Clark of the Respondent for a job as a receiving clerk, $5 an hour, 25 cents an hour, or insurance, and she took the 25 cents.

Plant Manager Gerry Adams testified that the 30 days' probation language was on the warning notice when Supervisor Parker showed it to him before he discussed it with Fletcher. He said Respondent had no record that Fletcher's husband called the plant to advise that Fletcher would not report to work on Friday. However, General Counsel's Exhibit 8, the termination notice signed by Supervisor Parker, states that Fletcher's husband called him on September 29, 1988, and informed him that Fletcher was ill and would not be at work on Friday, September 30, 1988. Adams stated Parker made the decision to terminate Fletcher and he agreed with him.

Respondent's operations manager, Cecil Farley, testified that he did not know about an arrangement Fletcher had made to attend football games. On one Friday, he said Fletcher was absent and he called in Helen Abshire to work in her place. Abshire came in ill but performed the work. Apparently Farley was referring to Friday, September 23.

Conclusions

The testimony of Judy Fletcher is essentially undisputed in the record that she had an arrangement with her supervisor, Dan Parker, that she could leave work to attend Friday afternoon and evening high school football games, so long as she informed someone she would be leaving and arrange for an inspector to work in her place. If Fletcher did not in fact have an express agreement with Parker for her to attend the games, it is clear that neither Parker nor any other member of management ever told Fletcher she could not leave early to attend the games on Fridays. In fact, the evidence clearly indicates that Parker and other supervisors acquiesced in Fletcher's arrangement to leave early on Fridays. Apparently the arrangement was carried out successfully on August 26 and September 2, 1988. Thereafter, a new inspector, Sutliffe was hired and was being trained by Inspectors Fletcher and Abshire. The September 9 game was out of town and Inspector Gene White worked in Fletcher's place.

Inspectors Fletcher and Abshire thought Sutliffe was sufficiently trained to carry out the inspection duties independently of assistance on Friday, September 9, 1988, and Fletcher left early for the game. When she inquired of Supervisor Peggy White whether Sutliffe made out all right on Friday night, White said ''yes,'' he did well without a problem.

However, Fletcher did not have another inspector to work with Sutliffe on Friday, September 23 since she and Inspector Abshire felt that Sutliffe had proven himself on the previous Friday, September 9. However, Fletcher learned on Saturday, September 24, that Supervisor Cecil Farley came into the plant the night before (September 23), and gave Sutliffe a different job to perform for which he did not have the paper work. Sutliffe called Abshire, who came from home and got the paper work for him. When Fletcher reported to work on Monday, September 26, Parker accused her of leaving the job without telling any one. When Fletcher told him she told Abshire, Parker told her, Abshire told him she did not inform her. Fletcher brought Abshire to Parker and Abshire told Parker, if Fletcher says she told me, she probably did, ''I was so busy I just did not remember.'' Parker nevertheless gave Fletcher the written warning (G.C. Exh. 6), placing her on 30 days' probation—stating that a repeated infraction will result in her termination. On the following Wednesday, Respondent hired an experienced inspector, Ron McCrosky. Since two inspectors were on the second shift, Fletcher asked Parker did she still need someone to fill in for her on Fridays, and he said ''yes.''

In preparation for the next game, Friday, September 30, Fletcher asked White and Whelchell could either of them fill in for her on Friday. Since she did not receive an unequivocal yes from either of them, Fletcher told Abshire about the qualifying answer she received from White. Abshire said, ''Well, if they can't, I will'' fill in for you. However, on Thursday night Fletcher said she became ill and asked her husband to call Parker on Friday and inform him that she was ill and would not be at work on Friday. The record shows that Parker acknowledged receiving Fletcher's message in time.

Nevertheless, when Fletcher came to work Monday, October 3, 1988, Supervisor Parker sent for her. When she arrived he gave her her timecard and told her to sign it. Fletcher signed the card and Parker asked her did she have a doctor's excuse for Friday, September 30, and Fletcher said

''no.'' Parker then gave Fletcher the termination notice (G.C. Exh. 8) for an unexcused absence without a doctor's excuse.

The record shows that Respondent's sick leave policy was not a clear and definitive one which was uniformly followed. Myrtle Hambrick testified that a doctor's excuse was not required unless the employee was out 3 days. She said the policy and procedures handbook simply said a doctor's excuse may be required, but she always brought one.

Darlene Pennington testified without dispute that she had been out sick for 1 day and when she returned she did not bring a doctor's excuse and no one asked her for one.

Donna Reed testified without dispute that she was out sick 1 day and did not bring, nor was she asked for a doctor's excuse. On another occasion she said she was out sick and Hambrick did not require a doctor's excuse. Reed further stated that the manual provides that employees bring a doctor's excuse after use of medical leave. She had been written up for absenteeism but was never put on probation.

Rovena Lee testified that if different employees were absent more than 3 days he or she was to bring a doctor's excuse.

Pattie Allen was perhaps on sick leave more than any employee mentioned in the record. She testified that no one ever told her a doctor's excuse was required, but she always brought one.

Mildred McKinney testified that she was out ill and she called management and informed them that she was ill. When she returned 2 days later, she did not bring a doctor's excuse. Her supervisor, Helen Abshire, did not ask her for one. Nor was she given a warning for not having a doctor's excuse.

Finally, Human Resources Manager Terri Ann Hodge Philpott testified that a doctor's excuse was required only when an employee had been absent more than 3 days, unless an immediate supervisor suspects the employee is abusing sick leave.

Since Respondent discharged Judy Fletcher for being out sick 1 day (Friday, September 30, 1988), of which Abshire and her supervisor, Parker, had advance notice, it is clear that Respondent's discharge of her was motivated by something other than her being out sick on that day. This true because if a doctor's excuse was required at all under Respondent's vague sick leave policy, it was not required unless Fletcher was out 3 days. After all, the essentially consistent, corroborated, and credited testimony of the witnesses, including some of Respondent's management witnesses, maintained that Respondent did not enforce a doctor's excuse policy. Enforcing a required doctor's excuse against Fletcher, was a discriminatory enforcement, since such requirement was not made for other witness employees who had used sick leave and did not bring a doctor's excuse, and none of them was required to do so.

Respondent's notice of termination of Fletcher does not state that she was terminated for leaving work to attend football games because Respondent knew, had approved, or acquiesced in Fletcher's arrangement to leave early to attend the games. Consequently, when the fact that Respondent issued its first warning to Fletcher for leaving early on Friday, September 23, and its termination notice to her for being on leave without a doctor's excuse September 30, it is clear Respondent's charge is without merit since she had previously informed Respondent she was ill and a doctor's excuse was not required for 1 day's absence. When Respondent's above-stated reason is considered in the context of the duration of Fletcher's employment, February 12, 1987, until October 3, 1988, the timing of both the probation and termination notices amidst the employees' union activities, of which fact Respondent had knowledge, further evidenced by the antiunion climate in the plant manifested by the Respondent, the circumstances surrounding Fletcher's termination appear to be more than suspicious.

On closer examination the record shows that Fletcher was a quality control inspector, also certified to perform military work. She was given the authority to reject work which did not meet the customer's standards, and her personnel record, prior to September 26, 1988, was free of any warnings or reprimands. Respondent has failed to establish, with credible evidence, that Fletcher's absence on September 26 created a work backlog, which jeopardized the work schedule. In fact, the several questionable alterations by Respondent of documentary evidence established in the record further serve to discredit the Respondent's testimonial account and expose the pretextual nature of its defense. Moreover, Fletcher's union interest and activity, as well as Respondent's knowledge thereof, are well established under sections B and C, supra. Thus, the precipitant issuance of a warning and swift termination of Fletcher, a long-time and competent employee, without any prior warnings about attendance, performance, or attitude, clearly substantiates the prima facie showing that Respondent's motive for discriminatorily terminating Fletcher was her union interest and activity. *Production Stamping*, 239 NLRB 1183, 1193 (1979); *Howard Johnson Co*., 209 NLRB 1122, 1131 (1974); *Sweeney & Co. v. NLRB*, 437 F.2d 1127, 1133 (5th Cir. 1971). Under these circumstances, I further find that Respondent has failed to present sufficient credible and probative evidence to demonstrate that it would have laid off Judy Fletcher, even if she and other employees were not engaged in protective union activities. Consequently, Respondent's layoff of Fletcher was coercively discriminatory and in violation of Section 8(a)(1) of the Act.

Pattie Allen

In evaluating the evidence relating to the layoff of Pattie Allen, it is first noted that the evidence in every respect demonstrates that not only was she a very competent worker, but also an employee who was out on approved medical leave a considerable number of times. Nevertheless, Allen remained in Respondent's employ off and on from October 26, 1987, to October 7, 1988, and she had never received a warning or reprimand for work performance, attendance, or attitude. Management knew she had a medical problem and the record indicates that it was not deemed significant since she had no warnings about attendance. Additionally, Allen had received good evaluations for her work performance and had received several wage or merit increases in pay. She was sent to Baltimore to assist in the repair of work shipped there that was improperly performed in the plant by another employee. Manager Shelton undisputedly had considered making Allen a supervisor just a few weeks before she was laid off. Aside from her performance and attendance record, Allen was perhaps the instigator of the union activity. It was she who called the union representative in February 1988 and asked employees about their interest in the Union. Rovena

Lee testified that Mildred McKinney, Judy Fletcher, and Pattie Allen were known union supporters because they had discussed the Union with other employees including herself. As previously found, during a discussion with Plant Manager Mike Shelton in September 1988, the credited testimony shows that Shelton occasionally asked the Respondent's trainer, Erlene Earls, was Allen a union supporter or how did Allen feel about the Union. Shelton also told Earls that the union supporters were in the location where Allen worked in the plant. When Allen and fellow employee Regina Oxley went to Manager Shelton in January or early February to inquire why they were transferred to other jobs, Shelton accused Allen of stirring up trouble. Allen told him that if she wanted to stir up trouble she could organize a union. Manager Cecil Farley acknowledged he reported that conversation between Shelton and Allen in management meetings, including meetings held in September and October 1988. The record further shows without dispute that Allen had a conversation with Plant Manager Gerry Adams on October 6, during which time she read off a list of complaints and questions. Adams wrote down Allen's concerns and told her he needed more data but that he would get back to her. The next day, October 7, Allen's supervisor, Ralph Leach, told her to be prepared for a bad day. Later, during the same day, she was laid off with five or six other employees. As Allen's layoff slip notes, she met with Manager Adams just a day or two before her layoff, and he described her as criticizing fellow employees, management, supervisors, and everyone then asked for a raise. When Adams announced the layoff October 7, while looking at Allen, he said he was getting rid of the ''troublemakers and gossipers.'' In the contexts of Allen's union activity, Adam's use of the terms ''troublemakers and gossipers'' could have had reference only to union activist such as Allen. Although the record has demonstrated Respondent's preference for retaining Allen in its employ prior to October 6, 1988, in selecting employees' for layoffs, it is particularly noted that Respondent ignored Allen's seniority in laying her off October 7. Below is a list of employees and their dates of hire (R. Exh. 9):

Name	*Hire Date*
C. Abillar	3–4–88
J. Barlow	8–22–88
J. Bradley	11–27–87
T. Bridges	8–1–88
B. Compton	8–24–88
E. Crews	3–5–88
D. Croy	11–13–87
A. Dalton	2–15–88
J. Daniels	12–19–88
W. Davis	3–4–88
K. Francis	11–9–87
A. Green	4–26–88
E. Hale	8–29–88
B. McKenzie	8–8–88
B. McQuire	3–7–88
M. Miller	3–7–88
J. Pendleton	8–22–88
S. Stafford	3–7–88
A. Taylor	9–6–88
L. Vance	9–6–88
L. Whitlow	11–2–87
S. Woods	3–7–88

An examination of Respondent's Exhibit 9 shows that only 5 days after Respondent laid off Allen and McKinney, it hired L. Hazelwood and B. Woody on October 12, 1988.

The recent hiring of these two employees contradicts Respondent's contended reduction in force defense for laying off Allen and demonstrates that such defense was advanced as a pretextual contrivance. I therefore conclude and find upon the foregoing evidence that the General Counsel has made a prima facie showing sufficient to support the inference that the protected union activity of Allen was the motiving cause for Respondent laying her off on October 7, 1988.

Under these circumstances, I further find that Respondent has failed to present sufficient credible and probative evidence to demonstrate that it would have laid off Allen, even if she and other employees were not engaged in protective union activities. Consequently, Respondent's layoff of Allen was coercively discriminatory and in violation of Section 8(a)(1) of the Act.

Mildred McKinney

As previously found, 3 days before the October 7, 1988 layoff, Supervisor Myrtle Hambrick came to Mildred McKinney and asked her had heard anything about somebody in commercial trying to put a union in. When McKinney said no she had not, but ''I would be the first damn one to sign for it,'' Hambrick said she had better watch what she said, because she could get fired for such talk. McKinney said she believed Hambrick was going to tell management so she told Hambrick she was just kidding. On the morning of October 7, 1988, Plant Manager Adams announced there was going to be a layoff, and it was not going to be according to seniority; that Respondent was going to get rid of the ''troublemaker and gossipers.''

After lunch, Supervisor Ken Sells came to McKinney and told her she had 2 minutes to get her things together, and he escorted her to the office of Supervisor Dan Parker, who informed McKinney she was being laid off not in accordance with seniority. Again, amidst the union activity of the employees from July to October 1988, of which fact Respondent had knowledge and had created an antiunion climate in the plant, the layoff of McKinney, like that of Fletcher, was precipitous, and without any meaningful prior warning. McKinney had been in Respondent's employ since April 14, 1987, and had never received a warning about her performance, attendance, or attitude. *Production Stamping, Inc*., supra; *Howard Johnson Co*., supra. Moreover, it is interesting in her case, as it is in Allen's, that within 5 days after her layoff, the Respondent hired two inexperienced workers. *Schnadig Corp*., 265 NLRB 147, 161–164 (1982).

Although Respondent recalled McKinney back to work March 29, 1989, it is clear that her abrupt layoff on October 7, 1988, was motivated by her union activity. McKinney was one of the employees Respondent knew and suspected participated in the union activity, because it may be reasonably inferred from the evidence that Supervisor Hambrick reported McKinney's prounion remarks to management: that ''she would be the first damn one to sign for the union.'' Moreover, Respondent's plant manager, Shelton, had previously forewarned the employees that anyone thinking about

a union would be immediately terminated. Since Respondent's discharge of McKinney was an execution of Manager Shelton's ultimatum, it is clear that she was coerced in the exercise of her protective Section 7 rights by being discriminatorily discharged for her union activity, as well as her fellow employees' union activity.

Since the evidence of the discharge of McKinney is inconsistent with Respondent's contended defense, that the layoff was a reduction in force due to poor production and financial straights, the General Counsel has made a prima facie showing sufficient to support the inference that the Respondent's layoff of McKinney was motivated by her union activity. Moreover, it is further found that Respondent has failed to present sufficient credible and probative evidence which demonstrates that it would have laid off Fletcher, Allen, or McKinney even if they and other employees were not engaged in protective union activities. Having failed to establish such proof, Respondent's discharge or layoff of them was also coercively discriminatory and in violation of Section 8(a)(1) of the Act. *Wright Line*, supra.

IV. REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I will recommend that it be ordered to cease and desist therefrom and that it take certain affirmative action designed to effectuate the policies of the Act.

Having found that Respondent violated Section 8(a)(1) of the Act by creating the impression among its employees that their union activities were under surveillance; by referring to employees engaged in union activities as union organizers, troublemakers, rumor starters, gossipers, or hellraisers; by threatening employees with plant closure because of their union interest or activities; by telling an employee she was not selected for a supervisory position because of her union activities; by threatening to discharge employees because of their union activities; by telling employees they are hated by other employees because of their union activities; and further coercing and restraining employees by discriminatorily discharging or laying them off, and refusing to recall them, because of their union activities, I will recommend that Respondent cease and desist from engaging in such coercive and discriminatory conduct; and that it make Judy Fletcher, Pattie Allen, and Mildred McKinney whole for any loss of earnings they may have suffered within the meaning and in accord with the Board's Decision in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and *Florida Steel Corp*., 231 NLRB 651 (1977),[4] except as specifically modified by the wording of such recommended Order.

Because of the character of the unfair labor practices found the recommended Order will provide that Respondent cease and desist from or in any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed by Section 7 of the Act. *NLRB v. Entwistle Mfg. Co*., 120 F.2d 532, 536 (4th Cir. 1941).

On the basis of the above findings of fact and on the entire record in this case, I make the following

[4] See generally *Isis Plumbing Co*., 138 NLRB 716 (1962).

CONCLUSIONS OF LAW

1. Respondent, El-Tech Research Corporation is, and at all times material, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, United Mine Workers of America is, and has been at all times material, a labor organization within the meaning of Section 2(5) of the Act.

3. By creating the impression among employees that their union activities were under surveillance, Respondent has coerced and restrained employees, in violation of Section 8(a)(1) of the Act.

4. By referring to employees engaged in union activities as troublemakers, union organizer, rumor starters, gossipers, and hellraisers, Respondent has coerced and restrained employees, in violation of Section 8(a)(1) of the Act.

5. By threatening employees with plant closure and plant movement because of employees' interest in, or activities on behalf of the Union, Respondent has coerced and restrained employees, in violation of Section 8(a)(1) of the Act.

6. By informing employees they were not considered for supervisory positions because of their union activities, Respondent has coerced and restrained employees, in violation of Section 8(a)(1) of the Act.

7. By threatening to discharge employees because of their union interest and activities, Respondent has violated Section 8(a)(1) of the Act.

8. By informing employees they are hated by other employees because of their union activities, Respondent has coerced and restrained employees, in violation of Section 8(a)(1) of the Act.

9. By discriminatorily discharging employees and laying off other employees because of their union activities, Respondent has coerced and restrained employees, in violation of Section 8(a)(1) of the Act.

10. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

The Respondent, El-Tech Research Corporation, Princeton, West Virginia, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Creating the impression among employees that their union activities are under surveillance.

(b) Referring to employees engaged in union activities (union organizers) as troublemakers, rumor starters, gossipers, and hellraisers.

(c) Threatening employees with closure or movement of the plant because of their union activities.

(d) Informing employees they are not considered for supervisory positions because of their union activities.

(e) Threatening employees with discharge because of their union activities.

(f) Informing employees they are hated by other employees because of their union activities.

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(g) Discriminating against employees by discharging or laying them off, and refusing to recall them immediately because of their union activities.

(h) In any like or related manner interfering with, restraining, or coercing employees of Respondent in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Judy Fletcher, Pattie Allen, and Mildred McKinney whole for any loss of earnings suffered by them as a result of the discrimination practiced against them from the date of their discharge or layoff to the date that they were or will be reinstated to their jobs, with interest, in the manner described above in the section entitled ''The Remedy.''

(b) Post at Respondent's plant located at Princeton, West Virginia, copies of the attached notice marked ''Appendix.''[6] Copies of the notice, on forms provided by the Regional Director for Region 11, after being duly signed by an authorized representative of Respondent, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Acting or Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

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[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''